No. 20649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAMON NOVARRO,

Appellant,

vs.

PETER PITCHESS, Sheriff of the ~~City~~ COUNTY of Los Angeles,

Appellee.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal From the United States District Court,
Southern District of California, Central Division.

BRIEF OF REAL PARTY IN INTEREST.

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
ALLEN URI SCHWARTZ,
Deputy City Attorney,
Room 400, City Hall Annex,
111 East First Street,
Los Angeles, Calif. 90012,
Attorneys for Real Party in Interest.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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order sets forth the reasons for such denial. Appellant filed a Notice of Appeal with the court from the order denying his petition for a writ of habeas corpus and received permission to prosecute his appeal. The District Court issued a certificate of probable cause. [See Transcript of Record on Appeal.]

Opening Statement.

The Real Party in Interest, herein, Roger Arnebergh, the City Attorney for the City of Los Angeles, representing the People of the State of California, respectfully requests that this Honorable Court affirm the order of the district judge, entered on November 16, 1965, which denied the appellant his petition for a writ of habeas corpus.

Statement of Facts.

The Real Party in Interest hereby incorporate by reference the facts as recited in Appellant's Brief, Statement of Facts, pages 16 through 21, as if fully set out herein.

Issue Presented on Appeal.

Will a Federal Writ of Habeas Corpus Issue in Cases Where the Petitioner is Not in Custody and Not Restrained of His Liberty?

ARGUMENT.

Will a Federal Writ of Habeas Corpus Issue in Cases Where the Petitioner Is Not in Custody and Not Restrained of His Liberty?

The Real Party in Interest, herein, has no quarrel with the proposition that a state prisoner may petition the federal courts for a writ of habeas corpus ". . . unless it appears from the application that the applicant or person detained is not entitled thereto." (28 U.S.C.A., §2243.)

The Transcript of the Record on Appeal shows that the appellant is not in custody now and that he was not in custody on August 20, 1965, the date the Petition for a Writ of Habeas Corpus was filed in the United States District Court. It should also be noted that the petition does not allege that the appellant was in the custody of the Sheriff of Los Angeles County, appellee herein, when the petition was filed.

Thus it is obvious that appellant is not, nor was he on August 20, 1965, in the custody of the appellee, and that he is now on $250.00 bail.

Title 28, U.S. Code, Section 2241, reads in part, as follows:

> ". . . (c) The writ of *habeas corpus shall not extend to a prisoner unless—*
>
> (1) . . . .
>
> (2) *He is in custody* for an act done or omitted in pursuance of . . . an order, process, judgment or decree of a court or judge of the United States; . . ." (Emphasis added.)

Title 28, U.S. Code, Section 2254, reads in part, as follows:

> "*An application for a writ of habeas corpus in behalf of a person in custody* pursuant to the judgment of a state court. . . ." (Emphasis added.)

Title 28, U.S. Code, Section 2255, includes the following phrases:

> "A prisoner in custody under sentence of a court . . . claiming the right to be released . . ." and
> "An application for a writ of habeas corpus in behalf of a prisoner. . . ."

The above sections, governing the issuance of a writ of habeas corpus in the federal courts, require that the petitioner be a prisoner in custody. This was not the case at the time the appellant, herein, filed his petition for a writ of habeas corpus in the United States District Court, nor does his petition allege that he was in the custody of the appellee, herein, at that time.

> "A petition for writ of habeas corpus should state that the petitioner is imprisoned or otherwise restrained of his liberty, and should show on its face that the prisoner is entitled to his discharge. It should show in whose custody the petitioner is detained; the place of imprisonment. . . ." 25 Am. Jur., Habeas Corpus §125, page 236.

It is the well established rule in federal courts that a writ of habeas corpus will not issue unless the applicant is in custody at that time, otherwise, the federal courts have no jurisdiction to issue such writ or even hear any argument thereon.

This is the rule followed by the United States Supreme Court, as illustrated by the language in the following cases:

"Its purpose is to enable the court to inquire, first, if the prisoner is restrained of his liberty. If he is not the court can do nothing but discharge the writ.

Wales v. Whitney, 114 U.S. 564, 571.

"Something more than moral restraint is necessary to make a case for habeas corpus."

Wales v. Whitney, supra, pages 571-572.

"When a prisoner is in jail he may be released upon habeas corpus when held in violation of his consitutional rights."

Roger v. Peck, 199 U.S. 425, 433.

". . . in order to entitle the present appellant to the relief sought, *it must appear that he is held in custody* in violation of the Constitution of the United States." (Emphasis added.)

Frank v. Mangum, 237 U.S. 309, 326.

In *McNally v. Hill*, 293 U.S. 131, the court stated the following:

". . . the writ of *habeas corpus ad subjiciendum*, . . . [is one] by which the legality of the detention of one in the custody of another could be tested judicially." (page 136.)

"The purpose of the proceeding . . . was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail. . . ." (page 136.) "*Without restraint of liberty, the writ will not issue.*" (Emphasis added.) (page 138.)

"A sentence which a prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." (page 138.) "Wherever the issue has been presented, this Court has consistently refused to review, upon *habeas corpus,* the questions which do not concern the lawfulness of the detention." (page 139.)

In *United States v. Hayman,* 342 U.S. 205, the court traced the history and the use of the writ of habeas corpus and held that such writ is only available to a person in custody.

In *Heflin v. United States,* 358 U.S. 415, Mr. Justice Douglas, writing the majority opinion, stated as follows:

"A majority . . . are of the view . . . that §2255 [28 U.S.C.A.] is available to attack a sentence under which a prisoner is in custody." (page 418.)

Mr. Justice Stewart, writing the concurring opinion, states:

"The very office of the Great Writ, its only function, is to inquire into the legality of the detention of one in custody." (page 421.)

"*. . . it is a condition upon this Court's jurisdiction to adjudicate an application for habeas corpus that the petitioner be in custody when that jurisdiction can become effective.*" (Emphasis added.)

Parker v. Ellis, 362 U.S. 574, 576.

In *Jones v. Cunningham,* 371 U.S. 236, the court defined the words "in custody" and held that restraint on the personal liberty of a petitioner is required before a writ of habeas corpus will issue.

"*State prisoners are entitled to relief on federal habeas corpus only upon proving that their deten-*

tion violates the fundamental liberties of the person. . . ." (Emphasis added.)

Townsend v. Sain, 372 U.S. 293, 312.

The rule stated above and adhered to by the United States Supreme Court is found in the language of the following cases in the lower federal courts.

In *United States ex rel. Walmore v. Tittemore*, 61 F. 2d 909 (C.A. Wis. 1932), the court held that a person discharged on bail is not restrained of his liberty so as to entitle him to a discharge on habeas corpus.

In *Crow v. United States*, 186 F. 2d 704 (C.A. Cal. 1950), the court, on page 706, held that:

> "Relief under habeas corpus is limited to release from present detention. *It is not available to test the legality of threatened detention.*" (Emphasis added.)

In *Roseborough v. People of the State of California*, 322 F. 2d 788 (C.A. Cal. 1963), the court states as follows:

> "An application for a writ of habeas corpus is the assertion of a right against the person having the applicant in custody." (page 789.)

In *Matysek v. United States*, 339 F. 2d 389 (C.A. Cal. 1964), the court discussed the requirements for a writ of habeas corpus and 28 U.S.C.A., §2255.

> "It is elementary that the general rules applying to habeas corpus are applicable to §2255 proceedings." (page 394.)
>
> "Whatever reasons existed for the California Supreme Court to ignore the general rule requiring 'custody,' we are not bound by that decision, and decline to consider it controlling here." (pages 394-395.)

(The above mentioned quote refers to *In re Peterson*, 51 Cal. 2d 177.)

> "Having been cited to no federal cases holding that a person on bail is sufficiently restrained to be in constructive custody, so as to avail himself of §2255, we . . . hold the district court had no jurisdiction to grant or deny relief to appellant." (page 395,)

Lastly, the Pennsylvania Court, in 1965, stated the rule as follows:

> "Of course, if the sentence has expired, or *if the appellant is not in confinement on the present sentence, the case would be moot.*" (Emphasis added.)
>
> *United States ex rel. McDonald v. Commonwealth of Pennsylvania*, 343 F. 2d 447, 449 (C.A. Pa. 1965).

It is submitted that the District Court acted properly in denying the appellant a writ of habeas corpus since he was "not entitled thereto."

> "Habeas corpus may be sought only to effectuate a prisoner's immediate release, and not to test the legality of imprisonment at some future date."
>
> *United States ex rel. Allen v. United States Marshall*, 106 F. Supp. 165 (D.C. Ill. 1952), on page 165.

> "Any attempt, therefore, to test judicially the validity of a judgment order, under which a prisoner is not yet confined, is premature."
>
> *United States ex rel. Allen v. United States Marshall, supra*, page 166.

Conclusion.

Wherefore, the Real Party in Interest prays this Honorable Court affirm the decision of the United States District Court for the Southern District of California, Central Division.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

PHILIP E. GREY,
Assistant City Attorney,

ALLEN URI SCHWARTZ,
Deputy City Attorney,

Attorneys for Real Party in Interest.